Supreme Court of the United States

OCTOBER TERM, 1962

No. 27

BURLINGTON TRUCK LINES, INC., ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND NEBRASKA SHORT LINE CARRIERS, INC.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS.

APPELLANTS' REPLY TO APPELLEES' MOTIONS TO AFFIRM.

Certificate of Service Appended at Page 10.

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TABLE OF CASES AND STATUTES CITED.

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Pursuant to Rule 16(3), of the Revised Rules of this Court, appellants file this their Reply to the Motions to Affirm filed herein by appellees.

ARGUMENT.

Appellees (hereinafter referred to as "Commission" and "Short Line"), in separate motions to affirm, rely upon conflicting interpretations of the Commission's decision in arguing that the questions presented in Appellants' Jurisdictional Statement are not substantial. These conflicting assertions by appellees serve only to demonstrate that there is no rational basis for the Commission's deci-

sion. The incredibly divergent interpretations set forth in appellees' Motions illustrate the uncertain foundations upon which the decision rests and the future confusion it will create if it is permitted to stand as precedent to be relied upon by future applicants seeking to obtain operating authority from the Commission.

In granting authority to Short Line to transport general commodities between three of the largest cities in the Midwest, on the one hand, and Omaha, on the other, the Commission has created a giant new common carrier, at least in terms of operating authority, which will presumably offer substantial, permanent competition to presently certificated carriers. This action was taken on the basis of a showing not of inadequacy in available service, but rather on the basis of a showing of temporary disruptions in the interchanging of freight between union and non-union carriers resulting solely from labor difficulties brought about by actions of the International Brotherhood of Teamsters (hereinafter referred to as "Union") over which none of the carriers had control.

The Commission's summary of facts in its motion concerning available service during the period in question and that of Short Line are almost diametrically opposed. Referring to the willingness of Burlington and Santa Fe to interline freight with its stockholders, Short Line twists the Commission's findings, stating:

> "The Commission did not make this finding [that Burlington and Santa Fe provided continuous service] as to items that were originated on Burlington's and Santa Fe's system and routed to be interlined with Nebraska Carriers, many of which are the only common carriers to small Nebraska communities, but which were never received by such Nebraska carriers from Burlington or Santa Fe." (Short Line Motion, p. 6.)

The Motion of the Commission contains a part of the reply to this assertion by Short Line (Commission Motion, pp. 5-6):

> "• • • Burlington Truck Lines, Inc., and Santa Fe Trail Transportation Company which are rail subsidiaries appear to have accepted interline traffic from the stockholder-carriers more or less regularly when offered and to have generally maintained normal interline relationships with them."

The rest of the answer is contained in Examiner Sutherland's finding regarding available service subsequently adopted by the Commission (Exhibit B. J. S. p. 155):

> "[T]hey [presently certificated carriers] are transporting the traffic over their respective portions of the routes involved and *the shipments are moving through to destinations.*" (Emphasis ours.)[1]

Short Line asserts that the Commission was not attempting to adjudicate a labor dispute by granting it a certificate. Yet Short Line does not dispute the fact that the entire problem arose because of an organizational campaign by the Union. The Commission's motion admits the labor origins of the problem; however, it asserts that the questions raised by the instant appeal are moot for the reason that Congress has amended the Labor Management Relations Act.[2] Certainly, therefore, Congress believed the situation

1. Burlington and Santa Fe serve between all of the points embraced in the certificate granted to Short Line. Examiner Sutherland's reference to "portions of the routes involved" concerns itself with the entire authority sought which was broader than the subsequent grant.

2. It remains to be seen whether the 1959 amendments to the Labor Management Relations Act have finally solved the problems created by the refusal of employees to handle so called "hot goods" or to cross picket lines. The National Labor Relations Board has indicated that it will consider the problem on case by case basis, apparently on the assumption that all forms of such union action have not been outlawed. *Teamsters Local 546*, 133 NLRB No. 123 (1961). See also *American Feed Company*, 129 NLRB No. 321 and *Amalgamated Lithographers of America*, 130 NLRB No. 102; *NLRB* v. *Local 710*, Jurisdictional Statement Appendix E, p. 188.

to be a labor problem and not a transportation problem, otherwise it would have amended the Interstate Commerce Act and not the Labor Management Relations Act. In this connection, it is necessary to consider the cause of the problem—the labor dispute—and not merely its effects—the disruption in the interchanging of freight.

It is admitted by the Commission that the disruption in interchange practices of some of the carriers was temporary. The Commission asserts, therefore, that they are unlikely to recur. However, Short Line takes an exactly opposite position asserting that the disruptions were of a permanent nature and likely to persist unless the Commission took remedial action.

By arguing that the questions raised by this appeal are unlikely to recur, the Commission ignores the fact that there is presently pending before it an application for operating authority in which one of the grounds relied upon by the applicant is that the existing carriers failed to discharge their obligations under the Interstate Commerce Act for a short period of time due to a dispute between those carriers and the union representing their employees.[3] If the Commission's decision in the instant matter stands, it is certainly precedent upon which applicant in that case may rely. Similar questions will be raised again and again so long as unions possess the power to cause cessations or disruptions in service by taking action to obtain certain objectives believed to be beneficial for their members.

Neither the Commission nor Short Line makes any reference to the Commission's finding that by April 3, 1957, Watson Bros., Prucka Transportation and Independent

3. *Edwin Carl Johnson Common Carrier Application*, Docket No. MC 117130. The strike referred to in the *Johnson* case has no relation to hot cargo problem and therefore amendment to Labor Act does not affect *that application*.

Truckers were undertaking to maintain normal interline operations. Examiner Driscoll found

> "All fair indications are that, under the leadership of these large and progressive carriers, other Omaha trunkline carriers will strive to restore to normal their carrier relationships and interchange practices at Omaha." (Jurisdictional Statement, Appendix pp. 183-184.)

This action came less than one year after the interchange difficulties were first noted (Commission motion p. 4). Thus, the Commission's findings clearly establish that Burlington and Santa Fe provided service throughout the entire involved period between all of the points subsequently embraced in the Short Line certificate, and that three other carriers were able to work out their difficulties with the Union within one year after the disruptive activities of the Union began. There is no finding, and indeed there is no basis for one, that at any time during this period the available service between the points Short Line was subsequently certificated to serve was inadequate. Taken in its best posture for appellees the most that can be said is that interline difficulties were encountered by some of Short Line's stockholders. Shipments moved "through to destinations" during the entire period.

Although Short Line disputes appellant's reference to the temporary nature of the difficulties, the Commission does not (Commission motion pp. 7-8). The problem, admittedly caused by an organizational campaign conducted by the Union, was by its very nature temporary and the Commission's findings and motion do not quarrel with this conclusion. Furthermore, it is unfair to consider all of the carriers as one as Short Line does and then conclude that service was "inadequate" for three years. The findings made by the Examiners which were adopted by the Commission do not support this conclusion and the Com-

mission in support of its own decision does not argue that such conclusions are warranted from the findings upon which the decision is based.

The questions raised by appellants are substantial and remain unanswered. There was no effort by the Commission in its motion to disguise the fact that the Commission by its decision in the instant matter attempts to adjudicate a labor dispute in accordance with the Commission's view of what the labor policies of carriers ought to be and without reference to or jurisdiction over the Union. Short Line fails in its motion to *divert* attention from the labor aspects of this decision. Its search for a rational basis for the decision makes reference only to the conclusions of the Commission and not to the facts found by the Commission upon which the Commission relied in order to reach those conclusions. Its assertion that NLRB action would not have resulted in removing the disruptions in the service of some carriers cannot stand the light of day. Had the NLRB ordered the Union to cease its efforts to enforce the hot cargo clauses it had negotiated in its contracts with organized carriers, there can be no doubt that all of the disruptions would have disappeared. There is no assertion or finding that the carriers had any interest in the Union's organizational efforts or any reason for not interchanging freight at Omaha. Therefore, definitive action by the NLRB pursuant to its authority to adjudicate the legality of labor contracts would have solved the problem. Moreover, the Board has jurisdiction over both the Union and the carriers. The Commission's action left the Union free to continue its efforts to enforce the hot cargo contracts until the Board and this Court held them to be unenforceable, *Local 1976* v. *NLRB*, 357 U. S. 93 (1958).

There is no assertion or finding that the disruptions in interchanging resulted from actions of the existing carriers. Moreover, the Commission does not indicate that

in its opinion additional competition is necessary in the area which Short Line has been authorized to serve. Therefore, *Davidson Transfer & Storage Co. et al.* v. *U. S.*, 42 F. Supp. 215, cited by Short Line is not applicable. In the instant matter, the Union which is not subject to the Commission's jurisdiction caused disruptions in the interchanging of freight between some carriers. In an effort to adjudicate the resulting labor dispute, the Commission granted a certificate to Short Line thereby penalizing all of the existing carriers regardless of how any particular carrier reacted to the Union's pressure or whether adequate service to the shipping public was maintained at all times.[4] This action by the Commission, if allowed to stand, will permit the Commission in the future to assert jurisdiction in every situation where a carrier, or carriers are involved in a labor dispute. There is no justification for this extension of the Commission's jurisdiction and it should not be permitted.

As set forth in appellants' Jurisdictional Statement, the Commission has based a grant of authority upon findings which merely establish that the Union caused some disruptions in the interchanging of freight between some carriers during an organizational campaign. There is no finding that the motor carrier service was not adequate to meet the

4. In a recent ruling, the United States District Court for the Northern District of Oklahoma stated:

> "Under the National Transportation Policy as declared by Congress [54 Stat. 899 (1940), 49 U. S. C. preceding § 1 (1958)] and as construed by the Supreme Court [*Schaffer Transp. Co.* v. *United States*, 355 U. S. 83, 90; *I. C. C.* v. *Parker*, 326 U. S. 60, 70] the issuance of a certificate of public convenience and necessity requires determination by the Commission of the prejudice, if any, which will result therefrom to existing properly authorized carriers. Further, the adequacy of existing service is a proper item for consideration by the Commission in such a proceeding." *Parkhill Truck Co.* v. *U. S. et al.*, 14 Federal Carriers Cases paragraph 81, 406 (D. C. Okla. October 18, 1961).

needs of the shipping public at any time. The granting of authority in these circumstances is contrary to the standards set forth in the Interstate Commerce Act.

Use of the certification provisions of the Act to create substantial additional motor carrier competition in an area without a finding that the new service is needed and will not seriously jeopardize existing carriers clearly violates the National Transportation Policy expressed by Congress. The action of the Commission in the instant case penalized all carriers without regard to whether any particular carrier failed to fulfill its obligations under the Act. Moreover, the Union, whose attempted enforcement of the hot cargo clauses caused the disruptions is unaffected by the Commission's decision. Obviously, the complaint provisions of the Act (49 U. S. C. 304(c) and 312) are far better suited for dealing with specific breaches of duty by particular carriers. Use of these provisions of the Act would permit the Commission to take suitable steps against a carrier which failed to meet its obligations without at the same time penalizing every carrier in the area. The many cases relied upon by the Commission (Motion p. 10) and Short Line (Motion p. 10) illustrate the use of complaints filed with administrative agencies and courts by injured parties against particular carriers alleged to have breached their duty. Neither the Commission nor Short Line cites an instance where all carriers including the innocent were penalized by the creation of additional competition without regard to whether any permanent need for such competition existed. Injured parties could also have sought redress in the instant matter from the NLRB which has jurisdiction over both the Union and the carriers.

CONCLUSION.

The questions presented by this appeal are substantial and of great public importance. They are likely to recur many times as applicants for operating authority from the Commission attempt to rely on disruptions in interlining or service by motor carriers caused by unions to justify their applications. It is urged, therefore, that jurisdiction be noted and that the judgment of the District Court be reversed and the case remanded to that court for disposition consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, David Axelrod, one of the attorneys for Burlington Truck Lines, Inc., Santa Fe Trail Transportation Company, Watson Bros. Transportation Co., Inc., Red Ball Transfer Co., Interstate Motor Freight System, Inc., Independent Truckers, Inc., Illinois-California Express, Inc., Interstate Motor Lines, Inc., Navajo Freight Lines, Inc., and Ringsby Truck Lines, Inc., appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of December, 1961, I served copies of the foregoing Appellants' Reply to Appellees' Motions to Affirm on the several parties thereto, as follows:

1. On the United States of America, Appellee, by mailing a copy in a duly addressed envelope with postage prepaid, to Harlington Wood, Jr., United States Attorney, Federal Building, Peoria, Illinois, and by mailing copies thereof in duly addressed envelopes with Air Mail postage prepaid to Robert A. Bicks, Assistant Attorney General; to John H. D. Wigger, Attorney, and to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, Appellee, by mailing copies in duly addressed envelopes with Air Mail postage prepaid, to I. K. Hay, Assistant General Counsel, and Robert W. Ginnane, General Counsel, at the Offices of the Commission, Washington 25, D. C.

3. On Nebraska Short Line Carriers, Inc., Appellee, by mailing copies in duly addressed envelopes with Air Mail postage prepaid, to its respective attorneys of record, as follows: to J. Max Harding and Duane W. Acklie, Nelson, Harding & Acklie, 605 South 12th Street, Lincoln, Nebraska; and to James S. Dixon, 1031 First National Bank Building, Peoria, Illinois.

4. On General Drivers and Helpers Union, Local 554, affiliated with The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Appellant, by mailing copies thereof in duly addressed envelopes with first class postage prepaid, to their attorneys of record, as follows: to David D. Weinberg and Arnold J. Stern, 300 Keeline Building, Omaha, Nebraska.

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